IN THE

Supreme Court of the United States

OCTOBER TERM 1941

No. 131

UNITED STATES OF AMERICA,

Petitioner,

against

LOCAL 807, etc., et al.,

Respondents.

BRIEF FOR RESPONDENT CAHILL

LOUIS B. BOUDIN,
Attorney for respondent Cahill.

LOUIS B. BOUDIN,
of Counsel.

INDEX

PAGE

POINT I—The Anti-Racketeering Act was intended to cover offenses of great magnitude and having special characteristics 2

A. Magnitude as an element of national concern 2

B. Enormity of the offense 4

C. The Act was intended to deal with criminal gangs of a certain type 5

D. The Legislative Program, of which this Act was a part, was intended to cover matters within the exclusive jurisdiction of the Federal Government, and this Act should therefore be construed accordingly 7

POINT II—The defendant at the bar 9

POINT III—The payments received by the individual defendants were "wages" within the meaning of the Anti-Racketeering Act 16

POINT IV—The trial court committed reversible error in not permitting counsel for the defendants to discuss the meaning of the statutes under which they were indicted, or the applicability of those statutes to the facts in the case in addressing the jury 18

CONCLUSION 24

TABLE OF CASES

Commonwealth v. Porter, 51 Mass. 263 24

Int. Fur Workers Union v. United States, 100 F. (2d) 541 6

NLRB v. Waumbec Mills, 114 F. (2d) 226 17

People v. Buchhalter et al. 6

Phelps Dodge Corporation v. NLRB, 313 U. S. 177 17

IN THE

Supreme Court of the United States

OCTOBER TERM 1941

No. 131

UNITED STATES OF AMERICA,
Petitioner,

against

LOCAL 807, etc., et al.,
Respondents.

BRIEF FOR RESPONDENT CAHILL

In the accompanying brief submitted on behalf of Local 807 we have discussed the Anti-Racketeering Act in its relation to labor disputes, mainly in connection with the *proviso* contained in Section 420-d. What was said there applies to the individual respondents, since, as was there shown, the acts of the individual respondents complained of were performed in the carrying out of the policy of the labor union of which they were members, and the Act specifically includes officers and members within the protection of the *proviso.* Also, the indictment makes the labor union a party to the conspiracy; and, as pointed out in that brief, counsel for the Government, in opening to the jury, specifically stated that the basis of the indictment is the policy of the union in attempting to limit employment to its own members.

There are certain aspects of the case, however, which would bring the individual respondents within the exception contained in the Act as to *wages*, which would protect them against prosecution for the acts which were the basis of their conviction in the District Court, even if those acts were not directly connected with the carrying out of a labor union policy. It is to those aspects of the case that we desire to address ourselves principally in this brief.

POINT I

The Anti-Racketeering Act was intended to cover offenses of great magnitude and having special characteristics.

We have stated in the accompanying brief on behalf of Local 807 that in adopting the Anti-Racketeering Act, Congress had in mind crimes of an extraordinary nature. An examination of the reports of the hearings conducted by the Sub-Committee of the Senate Committee on Interstate Commerce, which resulted in the formulation and adoption of the Legislative Program of which the Anti-Racketeering Act was a part, and of the oral report of Senator Copeland to the Senate in introducing that Legislative Program, will show that the crimes and criminals intended to be reached had the following four characteristics: (1) Great magnitude in the amount of money involved, resulting in riches to the malefactors. (2) Enormity of the character of the offense as such. (3) Organization involving interstate ramifications. (4) Use of fast means of interstate locomotion.

A. Magnitude as an element of national concern.

It is hardly necessary to point out that Congress could not be assumed to have taken jurisdiction of crimes of force and violence,—a branch of legislation not assigned

to it by the Constitution, and which it had abstained from meddling with for nearly a century and a half of our existence under the Constitution,—in order to protect the citizens of the several States against offenses usually dealt with in local police courts, and what might be called "petty graft". And a glance at the companion bill which was part of the Legislative Program dealing with larceny will show that a *floor* had been placed to the kind of offense of which the federal courts may take cognizance thereunder (S. 2251; Cong. Rec., Vol. 78, p. 458; Materials, p. 55). It is true that another companion bill, that relating to the transportation in interstate commerce of stolen securities, does not contain any such floor. But that was clearly due to the fact that there is a presumption that stolen securities are of substantial value. And the hearings disclosed that the purpose of this particular bill was to catch bank robbers. The Court may take judicial notice of the fact that bank robberies do not involve petty sums.

Coming down to our own bill, it is clear that it was the intention of its sponsors, and of the Congress which adopted it, to deal with a matter which had become of national concern because of its *magnitude* in terms of money. It is sufficient in this connection to call the attention of the Court to the fact that at the hearings various speakers referred to the large sums of money involved in "racketeering", and the riches which these racketeers usually accumulate. And Senator Copeland, in his oral report to the Senate on behalf of the Senate Sub-Committee presenting the Legislative Program, specifically to the sums involved as a reason for the necessity of federal legislation, placing the amount at *thirteen billion dollars* (Cong. Rec., Vol. 78, p. 451; Materials, p. 48). And the bill itself showed that *magnitude* was an element of the crime Congress was called upon to deal with. It showed it in the penalty which it provided,—*a most unusual, if not unique, one.* The character of the penalty becomes particularly significant when we compare it with that which was provided in the bill which immediately preceded this one in the Legislative

Program,—the bill which sought to amend the war-time Sabotage Act. That bill provided that:

> "Whoever, with intent to prevent, interfere with, or obstruct * * * *the transportation of articles* to or from the United States, or from any State * * * shall injure or destroy, *by fire or explosives* * * * shall be fined not more than $10,000 or imprisonment not more than 10 years, or both."

That bill dealt with a most heinous offense,—sabotage by fire or explosives. And yet, there was *no floor* either to the fine or the imprisonment whereby the offense was to be punished; there was a ceiling of *ten years* to the imprisonment; and the Court was left free to impose either a fine *or* imprisonment. In our bill, on the other hand, there was a *minimum* of one year with respect to imprisonment, and the maximum was placed at *ninety-nine years;* and only the sky was the limit with respect to the fine. The provisions with respect to the latter clearly show that Congress had envisaged vast sums of money as the "gain" of the crime which it sought to bring within the federal jurisdiction by this legislation. And *both, fine and imprisonment*, were made compulsory. Nor is the Act as it now stands much different in its most significant features. The *floor* is still *there*. And the fine is a given sum,—*Ten Thousand Dollars, no less.*

B. Enormity of the offense.

An examination of the report of the hearings conducted by the Senatorial Sub-Committee, of Senator Copeland's oral report, and of the Legislative Program, will show that the Legislative Program was intended to cover crimes of particular enormity. It is sufficient to point in this connection to the fact that the bill which became the present Act was coupled in the Program with a bill covering kidnapping, and another dealing with sabotage by means of fire and explosives. But even more important is the fact that it was coupled in the same Program with a bill

for the control of traffic in and transportation of *firearms*. One cannot read the report of the hearings without being impressed with the fact that two features of the crimes intended to be dealt with by the Legislative Program were uppermost in the minds of those who participated in the hearings and of the Senatorial Sub-Committee which conducted them,—namely, the use of *firearms* in the commission of these crimes; and the use of *interstate means of communication and transportation* in planning the crime, in getting to and from the place of the commission of the crime, and in the hiding and disposition of the proceeds of the crime.

Again and again these aspects of the crimes intended to be dealt with were stressed at the hearings. And the members of the Senatorial Sub-Committee, which framed this Program repeatedly stated that the control of the sale and transportation of firearms was the pivot around which the entire Program revolved.

C. The Act was intended to deal with criminal gangs of a certain type.

A reading of the reports of the hearings before the Sub-Committee of the Senate Committee on Interstate Commerce, and of Senator Copeland's address in the Senate in introducing the Legislative Program, referred to by him as an oral report on behalf of the Sub-Committee, makes it clear that the sponsors of this legislation, and the Congress which adopted it, intended to deal with "organized crime",—a term strewn throughout the discussion of the subjects both at the hearings and in Congress. And by "organized crime" was meant organizations of persons whose *business* is crime, and who organized crime *as a business*, in the same manner as a large business organization organizes an ordinary business. These organizations were supposed to be "large-scale enterprises", with regular divisions or departments scattered throughout the country, and doing business from a center which directs operations

and local groups which report the operations to the center. These organizations were supposed to be composed of two classes of persons: What might be called the "operatives", who were doing the actual work, whether it was kidnapping or bank robbery; and "executives", who were recruited from among business men, and who, upon the surface, appeared like ordinary business men engaged in ordinary business. The latter was particularly true in what was referred throughout these discussions as "industrial racketeering".

Typical of that gentry was the defendant Buchhalter, in the case of *People* v. *Buchhalter et al.*, referred to in our brief in No. 132, who organized employers' "protective" associations in various industries. Besides the case of *People* v. *Buchhalter*, this gentleman figured in some important cases in the federal courts. In one of these cases, which was tried in the District Court for the Southern District of New York, and the trial reviewed in the Circuit Court of Appeals for the Second Circuit, it appeared that the activities of the business men's protective association involved in one of those industries, although consisting of merchants doing business in what is commonly called the Metropolitan District of New York, which includes New York City and a certain section of New Jersey and Connecticut, reached out as far west as Chicago.* And it was assumed throughout the discussions which led to the formulation of the Legislative Program that because of the nature of these operations they would come within the ordinary federal jurisdiction.

Before turning to that phase of the question we desire to call the attention of the Court to a brief passage in the report made by Senator Copeland to the Senate, *after* the Anti-Racketeering Act was adopted. This report dealt with the entire Legislative Program, and in it Senator Copeland said:

"Since my report of January 11, there have been introduced some 92 additional bills, all designed to close

* See *Int. Fur Workers Union* v. *U. S.*, 100 F. (2d) 541.

the gaps in existing Federal laws, and to render more difficult *the activities of predatory criminal gangs of the Kelly and Dillinger types.*"

(Senate Report 1440, 73rd Congress, Second Session; Materials, p. 60.)

D. The Legislative Program, of which this Act was a part, was intended to cover matters within the exclusive jurisdiction of the Federal Government, and this Act should therefore be construed accordingly.

An examination of the Legislative Program clearly indicates that Congress did not intend, by its adoption, to depart in any way from its historic legislative policy of limiting its penal legislation to matters *within the exclusive jurisdiction of the Federal Government.* As already pointed out in our brief in No. 132, that intention is manifest from the fact that Congress had failed to provide *for* concurrent jurisdiction by the States and *against* the double jeopardy. A detailed examination of the entire Program will justify that conclusion quite aside from the constitutional considerations indicated, for the Program clearly shows that Congress intended to deal either with matters of procedure in the federal courts or with crimes in which interstate commerce was used as *the means* of the planning or commission of the crime, or as a means of hiding or disposing of the proceeds of the crime.

The first of the bills on the Program was an amendment to the Packers and Stockyards Act of 1921, so as to include poultry in interstate commerce in the same category as cattle. This was apparently designed as a means of giving the Secretary of Agriculture such control over the poultry business as would permit him to deal with the so-called "poultry racket" which had been before the courts and was referred to during the hearings. The next bill was one to amend the statute of June 15, 1917, so as to extend the war-time statute intended to prevent sabotage in our foreign exports.

These two statutes were amendatory of old laws, intended to serve certain special purposes. The general Legislative Program begins with the third bill of the series, which finally became the Act here under consideration. This was followed by a bill dealing with extortion *by means of* the interstate use of the telephone, telegraph and radio. Then came a bill "to punish the transportation of securities in interstate or foreign commerce". Then came a bill "to extend the provisions of the National Motor Vehicle Theft Act", so as to convert it into a "National Stolen Property Act". Then came a bill "to amend the act forbidding the transportation of kidnapped persons in interstate commerce". Then came a bill "making it unlawful for any person to flee from one State to another for the purpose of avoiding prosecution or the giving of testimony". These bills were followed by four dealing with procedure in the federal courts. And the Program was concluded by an elaborate measure to control interstate traffic in firearms.

It will thus be seen that the Program, insofar as it dealt with crime, consisted of two parts; one, dealing with procedure in the federal courts, and the other dealing with substantive crimes in which instrumentalities of interstate commerce are used as a means of accomplishing the crime.

We respectfully submit that our Act must be assimilated to all the other acts which are neither regulatory nor procedural, and that it was the intention of Congress in enacting this Act to provide punishment for those extraordinary cases of organized interstate crime which had been discussed at such length at the hearings,—namely, where airplanes and fast automobiles are used in connection with the crime either in bringing the criminals to the scene of their operations or as a means of dispersal to various States, so as to make action by the States difficult if not impossible. This general statute was intended to be supplemented and strengthened by special provisions covering the carrying of stolen property from one State to another,

and the use of interstate means of communication for criminal purposes. That, we respectfully submit, is the proper construction to be given to this Act under the doctrine of *noscitur a sociis*. And it is the only construction which can save this statute from the taint of unconstitutionality, if it can be saved at all.

POINT II

The defendant at the bar.

Turning from an examination of the Act in question, the public agitation which preceded its enactment, the Legislative Program of which it was a part, the discussion accompanying the introduction of that Program, and the considerations urged upon Congress for its passage, to the actual defendants in this case, would inevitably bring to mind the proverbial transition "from the sublime to the ridiculous" but for the fact that the law here under consideration is not particularly sublime and the position of the defendants at the bar is too serious to provoke mirth.

The respondent Cahill, on whose behalf this brief is submitted, is rather typical of the respondents as a group. The jury gave him a middle position, when it came to mete out punishment,—by convicting him on two counts, while convicting some of the others only on one and some on four. Government counsel have picked him out as typifying the case as a whole by introducing the discussion as to the nature of the services rendered by the respondents and the remuneration received by them,—and the legal relation which resulted therefrom,—by a reference to this respondent and the testimony adduced at the trial concerning him.

> "The record,—say Government counsel,—clearly demonstrates that the operators did not consider themselves as employers of Local 807 men assigned to their trucks, and did not regard the payment of $9.42 to the 807 men as remuneration for services rendered.

> Truck owner Beatty told defendant Cahill that taking the money was 'just the same as highway robbery'; when Beatty attempted firing Cahill for wrecking one of his trucks, telling Cahill that he had never hired him, Cahill answered that 'there was no way of getting rid of him'. Two checks from Beatty's company to Cahill were marked 'for protection against racketeering'" (p. 20).

Let us, therefore, look a little more closely at this typical "Local 807 man", in his relation to his employer, so that the Court may be in a position to judge what was the true nature of the transaction, and the true character of the relationship between them. An examination of the record will disclose the following facts:

On January 27, 1938, George Beatty, the president and owner of a trucking concern, the incorporated name of which was B. & B. Transportation Company, Inc., of Uniontown, Pa., doing a trucking business between that town and New York City, entered into a "union" agreement with Local 807,—the agreement being of the standard form which is in evidence. The evidence indicates that he was not particularly anxious to enter into the agreement, because he did not care to pay the union scale of wages therein provided. But he was compelled to make the agreement because he had difficulty in "unloading". There is not a scintilla of evidence that violence or threats thereof were used on him or his employees, and there is evidence throughout the case that unloading was prevented by other means than the use of violence,—such as "platform men" refusing to accept loads delivered by non-union drivers, and consignees doing likewise, either because they sympathized with the union or because of the pressure of their own employees on the platform or other branches of the establishment. And Mr. Beatty's evidence in fact excludes the supposition that the unloading in this case was prevented by violence. His evidence on that point was as follows:

"Q. And who spoke next? A. I did next, and I told him we was there to try to get our business going again.

Q. What did you tell him? A. I told him that we were tied up and our drivers were tied up and we could not afford to lay around. We had to get moving.

Q. Did you tell him how long you had been tied up? A. I told him that we had been having trouble for the last month and now we had been tied up for a week or ten days and we could not get anything moving.

Q. Did you tell him how many trucks you had tied up? A. I told him we had around fifteen or twenty trucks tied up.

Q. And do you remember anything else that you told him? A. Well, he produced a contract for the union and said we had to sign a contract with the union before we could do anything at all, and the contract—I was allowed to read it—and it had the prices we had to pay the union and the rates, and I thought the rates were pretty high——

Q. No, tell us what you said. A. I told him that the rates were pretty high and he explained that that was their scale in New York and nothing could be done about it; that that is what everyone paid.

Q. Yes? A. And that we could not do anything until we signed a contract. Well, I wasn't anxious to sign a contract——

Q. Tell us what you told him, Mr. Beatty. A. I told him that we wanted to get our—the main thing we was interested in was getting our trucks running because they had us tied up and we could not operate; and he explained to me that we could not do anything until we signed a contract" (fols. 2424-2427)

"Q. Now, Mr. Beatty, after you signed that paper which is Government's Exhibit 15, did you and Brennan and Mr. Winterhalter—was that the name? A. Yes.

Q. (Continuing)—and Mr. Winterhalter go any place? A. Mr. Brennan took us out to Long Island to the Richmond Radiator Company's warehouse in his car.

Q. And what did you see him do there? A. He went in and talked to someone in the radiator company.

Q. Now, that you have said was your largest account? A. That was our largest account.

Q. After he came out what did he say? A. He said that it was fixed up that we would have all the business from now on.

Q. Did he say what he meant by 'all the business'?

Mr. Boudin: Objected to.

The Court: Sustained. What did he say?

The Witness: He says that he fixed it up for us, that we were fixed up, signed the contract with the union, and were in good standing with the union, and that would give us all the business, because there was no other company had a contract from our location" (fols. 2438-2440).

A day or so after the signing of the contract Cahill, a member of the union, came over to see Beatty at his hotel, and told him that he was entitled to work under the union contract, because he had "stopped the job". Beatty had hired another member of the union, one McGavish. McGavish came in while Cahill was there; and the two had an argument as to who was entitled to the job, in the course of which McGavish referred to the defendant Campbell as the one who had the deciding voice in the matter. Apparently that settled the argument. The next day McGavish reported for work and worked on the job. But the following day McGavish did not report for work but Cahill did. Cahill stayed on the job, and there was no complaint about him or his work, but difficulty developed shortly thereafter about his pay,—*Beatty being slow in paying, so that in March he was in arrears of some two weeks' pay.**

This resulted in a visit by Cahill to Uniontown which turned out to be both a business and social affair,—Cahill staying there overnight and being entertained by Beatty. This social intercourse led to a private arrangement concerning the business in hand,—namely, to an "under the

*On cross-examination Beatty testified that he had been in financial difficulties for a long time prior to his making the contract with the union.

hat" agreement, whereby Cahill agreed to accept a flat $40 per week in place of the per diem provision of the union contract,—because of Beatty's financial condition, which he explained to Cahill in the course of their long conversations in Uniontown.

On this trip to Uniontown Cahill was accompanied by another member of Local 807, one Murray, who drove Cahill in his car. Beatty was apparently so pleased with the arrangements he made with Cahill that he informed a friend of his, one Spackman, who was also trucking between Uniontown and New York, and Spackman thereupon made a similar arrangement with Murray.

The friendship did not, however, last very long; and for two reasons: Checks which Beatty had given to Cahill for the back pay were returned by the bank uncollected for insufficient funds; and about the same time Cahill got into an accident in driving one of Beatty's trucks which resulted in some damage to the truck. This resulted in an attempt by Beatty to discharge Cahill by telegram, which was subsequently countermanded. But the attempt had called the attention of the union officials to the matter, with the result that the union discovered the "under the hat" arrangement and ordered it discontinued and the terms of the union contract observed. Also that pay thereafter must be in cash. But the newest arrangement was short-lived, as Beatty's concern went out of business shortly afterward. Thereupon Cahill went into the employ of Spackman, *and was in that employment at the time of the trial.*

Spackman was also a witness for the Government, but uttered not a word of complaint against the way Cahill came into his employ or about the manner in which he did his work, although he apparently felt aggrieved by the fact that at the time of his arrangement with Murray he had been told by the latter that he could not work for Spackman except under a union contract, even though pay was to be not in accordance with the union scale but in accordance with the "under the hat" arrangement. It does not

appear whether or not the disclosure of Cahill's "under the hat" arrangement also led to a discovery of the Murray-Spackman arrangement. It probably did. For Spackman apparently thought that he had some grievance against the union, or at least against Murray, who had induced him to enter into a contract with the union.

There is nothing in the evidence which in any way connects this respondent with anything else testified to during the trial,—no mention of his name in any manner whatsoever in connection with any use of violence or threat thereof. Nor is there a scintilla of evidence to connect him with any "conspiracy", if there was one, except the fact that he was a member of the union, and that when he worked under the union contract he was getting the union rate of wages; except during the time when he was nominally working under the union contract but really under the "under the hat" arrangement,—when he was getting a flat salary of $40 per week, which was below the union rate of pay.

As to everything except the question of violence, this is our "typical" case.* What does it show? We respectfully submit it shows the following:

First: That the defendants were looking for work, and did work when they got it. Cahill and McGavish were having a serious altercation as to *who was to work*. And no one claimed that when Cahill got the job he did not perform his duties properly, whether he worked for Beatty or for Spackman,—who apparently employed Cahill because he became familiar with Cahill's work while the latter was working for Beatty.

* On the question of violence, the verdict of the jury would indicate that the majority of the individual defendants were no worse than Cahill. For the record shows that only eleven out of the twenty-six defendants were found guilty on more counts than Cahill; and among those eleven were Campbell and Furey, against whom there certainly was no evidence of personal violence or threats of violence, and who, like the union itself, were found guilty on all counts because somebody else's violence was imputed to them.

Second: That these employers were trying to get union men to make private arrangements, in violation of the union rules; and that they sometimes succeeded,—*their success being due to the fact that the men were anxious to keep their jobs and to earn a living by working.*

Third: That the trouble with the union in the "typical case" was due to the *financial condition* of the employer, which condition was antecedent to the trouble with the union, or to the making of the contract with the union, or the payment of any "tribute" to any of its members.

Fourth: When the trouble arose the "typical" employer did not scruple to resort to any means of getting out of the contract with the union or the payment of union wages. Or even of the payment for work done. Payment for work done then became "highway robbery". Furthermore, already this "typical" employer did not scruple to attempt to put upon the check, given in payment of back pay, a legend to the effect that it was given "for protection against racketeering".*

Fifth: That the union frowned upon all private or "under the hat" arrangements, and insisted that the regular union contract,—which provided for an honest day's work for a day's pay,—should be observed.

---

* Just what that inscription was intended to mean is rather difficult to ascertain from Mr. Beatty's vague testimony on the subject. Government counsel told the jury, and treat it in their brief in this Court, as if it read "in payment of a racketeering exaction". But that is not what it says. It says: "For protection *against* racketeering". The check represented a payment under the "under the hat" arrangement. Apparently, in Mr. Beatty's opinion it was the union contract that was the "racketeering".

POINT III

The payments received by the individual defendants were "wages" within the meaning of the Anti-Racketeering Act.

We respectfully submit that the monies received by the individual defendants below (other than Campbell and Furey, who are not charged with having received any money) were clearly "wages" within the meaning of the Anti-Racketeering Act. There can hardly be any doubt of this, insofar as it relates to the large majority of the defendants who were in the same position as respondent Cahill, both with respect to the lack of violence or threats of violence, and the doing of actual work continuously during whatever period of time their employment lasted. But even as to the few cases in which it was testified that they did not do any work, or did not do much work, it is clear, as pointed out by Judge Learned Hand in his opinion for the majority of the Circuit Court of Appeals, that those defendants offered to work, and that if they did not do any work it was because they were not permitted to do it. There was only one case, that of the defendant Murphy, as to whom there was evidence that he had refused to work on a certain occasion. But the record shows that Murphy had been *sought out by the employer*, who was a friend of his brother, and employed without the knowledge of the union, in a special capacity and under a special arrangement. The record is not clear as to what either the capacity or the arrangement was. But Murphy worked under that arrangement for only two weeks; and it was during this period, while working in the special capacity, that Murphy claimed that he did not have to perform any menial labor. And the record also shows that at the end of that two-week period the union compelled Murphy's employer to enter into a contract with it; *and that thereupon Murphy proceeded to work in the*

ordinary manner under the union contract. Apparently this was a case of an "under the hat" arrangement, calculated to defeat the union policy that the employer in question had induced Murphy to enter into.

Government counsel contend, however, that none of the defendants received "wages" within the meaning of the Anti-Racketeering Act, because the work was performed under a contract of employment "forced" upon the employer; and that that took it out of the legal category of "wages".

It is unnecessary to go into the question here at any length, since the opinion of the majority of the Circuit Court of Appeals has disposed of this argument on the basis of general legal principles. Certainly, a penal statute cannot be construed so as to give its provisions a *hyper*-technical and *ultra*-narrow meaning, *in derogation of the liberty of the citizen.*

There is, however, one aspect of the matter not touched upon by the opinion of the majority of the Circuit Court of Appeals, which we would like to urge upon this Court. And that is this: that in the domain of labor relations,—and that is what we are dealing with, both in the exception of "wages" and in the *proviso*,—the concepts of "contract", "employment", "employer", "employee", "reinstatement", and "back-pay" have a non-technical meaning, and a much wider scope than in other branches of the law or which they formerly had in this branch of the law.

Cf.

Phelps Dodge Corporation v. *NLRB*, 313 U. S. 177;
NLRB v. *Waumbec Mills*, 114 F. (2d) 226.

POINT IV

The trial court committed reversible error in not permitting counsel for the defendants to discuss the meaning of the statutes under which they were indicted, or the applicability of those statutes to the facts in the case, in addressing the jury.

Since the Government, on this petition, seeks to reinstate the judgment of the District Court, there are certain aspects of the case not related to the construction of the Anti-Racketeering Act, or of its applicability to the situation presented by the case at bar, which become of importance. Some of them are discussed in the accompanying brief submitted on behalf of other respondents. Some others will not be discussed, because we believe that the points discussed are sufficient for our present purposes.

There is one matter, however, which we consider it incumbent upon us to bring to the attention of this Court,—even though it is not necessary in order to prevent the reinstatement of the judgment of the District Court. We believe it to be of such importance in the administration of the criminal law in the federal courts as to deserve the attention of this Court, and to require a ruling from it.

The District Court restricted counsel for the respondents, both in the opening and in the closing addresses to the jury, by forbidding them to make any reference to the statutes under which the indictments were laid, by commenting either upon their meaning or upon their relation to the acts of the defendants for which they were being tried. This, we respectfully submit, was such a serious invasion of the rights of the respondents as to itself justify the reversal of the judgment by the Circuit Court of Appeals. The ruling of the Court was based,—we were told at the trial, although no mention of the indictment is made in Government counsel's brief in this Court,—on what is supposed to be the ruling in the federal courts,

and the general practice in these courts. It is this that makes the question a matter of importance in the administration of the criminal law in the federal courts generally. And we hope that this Court will pass upon the matter, in order that its decision may serve as a guide for the government of trial courts and counsel in the future.

It is the province of an opening to the jury to tell the jury what the case is about,—which should include a statement of the law which the defendants are supposed to have violated, so as to enable the jury to follow intelligently the presentation of the evidence. The reading of the indictment, which is part of our procedure, constitutes a sufficient commentary upon the law under which it is laid from the point of view of the prosecution. Counsel for the defense should be permitted to state their comment upon the Act,—in the limited sense of reading the Act with some brief explanation, so that the jury may understand the point of view of the defense, which we believe is necessary for the intelligent following of the evidence as it is presented. For that involves the act of attention and selection,—that is to say, the jury must be in a position, while the evidence is being presented, to understand the relative importance of the numerous facts usually adduced at a long trial so as to be able to retain them in their memory. We need not go here into the importance of this point, since it is well known principle of memory-psychology, that memory is a matter of selection,—that is to say, that only what is considered important is retained in one's memory.

The closing address to the jury is even more important, since it is the province of that address to present to the jury the *arguments* of counsel,—that is to say, the *reasons* which they present,—in support of their claim that under the law the acts do not constitute a crime. The address of counsel to the jury must not, therefore, be limited to a discussion of the facts, since frequently the *meaning* of the facts in their *relation* to the law is of much greater

importance than the question of the existence or non-existence of certain facts. This is best illustrated by the case at bar, *in which the particular question, both before the jury and the courts, is not so much what has occurred*, but rather *the significance of the occurrences proved in connection with the provisions of the law under which the defendants were tried.* If counsel are not permitted to touch upon that all-important subject, it seems to us, the closing address to the jury might as well be dispensed with. Unless, indeed, we should assume that the closing must be limited to an appeal for sympathy on the one hand and to prejudice on the other. The District Attorney apparently so conceived his role in the case, and he played prejudice up for all it was worth. But counsel for the defendants had a right to dispense with the appeal for sympathy in favor of an intelligent discussion of the whole issue,—the law involved and its application to a certain factual situation.

This was particularly important in a case like the present one, where it is easy to play up prejudices because of the class bias of the jury and the presence of violence. It was therefore necessary for counsel to explain why a labor-union may under the Anti-Racketeering Act be entitled to an acquittal notwithstanding the violence claimed or proved.

That this right is important as well as fundamental is best illustrated by this case. For the Court actually *omitted to tell the jury the very things that it should have been told above all.* The argument of counsel might have supplied at least in part what the Court omitted to do. And even if the Court had given full and correct instructions it would still have been necessary for counsel to discuss the matter with the jury from their point of view, as a preliminary to the Court's making its official statement and giving its official instructions. Of this opportunity the Court deprived the defendants.

At the conclusion of Government counsel's opening to the jury, counsel for the defense, realizing that Government counsel would attempt to try this case as purely one of violence, as if it were an ordinary case of assault in

a state court, thought it their duty to refer to the statutes under which the indictments were laid, in their relation to labor organizations and labor disputes. In order to avoid repetition, counsel for the defense had assigned this function to Mr. Boudin, one of the counsel for the defense. He therefore commenced his opening by saying:

> "Now I want you to remember one of two things in the course of the testimony as it will be presented to you because the purpose of any opening is merely to help you follow the testimony as it is being presented
> * * *
> I am going to prove to you both with respect to the Anti-Racketeering Act as well as the Anti-Trust Act that there is nothing that either the union, or as far as I know, the individual defendants have done that offends that law * * *
> Now there are two laws involved. There were originally two indictments. These were consolidated for the purpose of this trial. One is known as the Anti-Racketeering Act, which is a comparatively recent act, and one is known as the Anti-Trust Act, which is an old law. I will commence with the old law, the Anti-Trust Act, so-called Sherman Anti-Trust Law which was adopted July 2, 1890——"

At this point he was interrupted by the Court and the following colloquy ensued:

> "The Court: Mr. Boudin, I don't think you need go into the history of either the Sherman Act or the later passage. After all, what the jury are primarily concerned with in this case are the facts.
> Mr. Boudin: Yes.
> The Court: And the Court will instruct them on the law at the proper time.
> Mr. Boudin: Well, I just wanted to tell them what we are going to prove. As a preliminary, I was going to state what the law——
> The Court: No. You may say what you intend to prove, but, so far as the law is concerned, if the jury need any instruction, the Court will give it to them" (fols. 563-566).

And here is what occurred at the beginning of Mr. Boudin's summation:

"Now," said Mr. Boudin, "I say to you that when you get into your jury room please bear in mind the laws under which these indictments are found. The anti-trust law is an anti-trust law as it purports to be. It is an act which Congress had adopted way back in 1890 to protect this country against rapacious trusts, and a trust is a trust. You all know what a trust is, and I need not tell you now, after the end of a six-weeks' trial, that Local 807 is not a trust, and that the defendants on trial here, the individual defendants, are no more members of a trust than the other 10,000 members of Local 807. And if they are not a trust, if Local 807 is not a trust, I say these defendants are not guilty of violating the anti-trust act, if there is nothing here in this case, no evidence in this case that they have been tied up with anything else but the union; and I will talk in a moment as to what they actually did. But remember there is no suggestion that they have done anything else except what a union is supposed to do, or what members of a union are supposed to do, as their objects are concerned. I am not discussing now whether anyone has or has not indulged in violence or threats of violence, because as I told you, that would have nothing to do with the case in itself. If anyone commits an assault, he is usually tried for it, and he would not be tried in this court and before you ladies and gentlemen of the jury. In any event, the Court will tell you that that is not what they are on trial for——

The Court: Just a moment. Do not tell the jury what I will tell them.

Mr. Boudin: Well, I will say I expect your Honor to tell them.

The Court: Well, you may be disappointed.

Mr. Boudin: All right. It happens very frequently, your Honor, I am sorry to say, that lawyers are disappointed.

The Court: I do not want to have any confusion in the minds of the jury when they go to the jury room with respect to what I am saying to them in my charge and what somebody else may say to them in an argument upon the facts of this case. There are jurisdic-

tions in which counsel may argue the law, but in this court the jury are the sole judges of the facts, and the Court is the judge of the law. Proceed" (fols. 7001-7004).

This ruling was adhered to during the rest of the address, resulting in some more interruptions, and finally in an exception.

We respectfully submit that counsel had a perfect right to give to the jury not only their version of the facts, but also their version of the relation of the facts to the law under which the indictments were found and which the defendants are supposed to have violated. The excuse for depriving the defendants of that right stated by the Court seems to us inadequate, to say the least. The deprivation of counsel for the defense of the fundamental right of adequately addressing the jury, as it proved, did not tend to remove confusion in the minds of the jury, as is evidenced by their repeated requests for further instructions. But even if the Court had delivered a most lucid charge that would not have cured the error in depriving the defendants of so important a right. And as to the Court's statement that trials in a federal court are different in this respect, all we can say, is, that we do not know of any decision that bears out that statement. Without going into the technical question as to whether the Conformity Act requires the federal courts sitting in New York to conform to the practice of the New York State courts in this respect, it is sufficient to say that a defendant should not be deprived of so fundamental a right without a compelling reason. And there is no compelling reason that we know of that requires the federal courts to proceed differently from what is considered good practice generally in Anglo-Saxon jurisdictions.

On the question as to what is good practice under the Anglo-Saxon system of jurisprudence, we have no less an authority than that of Chief Justice Shaw,—one of the greatest jurists this country has produced. In the early

case of *Commonwealth* v. *Porter*, a case in which this question was made the point of decision, the Supreme Judicial Court of Massachusetts laid down the rule of law which has never been departed from, as far as we know, in an elaborate opinion written by its great Chief Justice. The closing paragraph of that opinion is as follows:

> "As the jury have a legitimate power to return a general verdict, and in that case must pass upon the whole issue, this court are of the opinion that the defendant has a right by himself or his counsel to address the jury, under the general superintendence of the court, upon the material questions involved in this issue, and to this extent, and in this connection, to address the jury upon such questions of law as come within the issue to be tried. Such address to the jury, upon questions of law embraced in the issue, by the defendant or his counsel, is warranted by the long practice of the courts in this Commonwealth in criminal cases, in which it is within the established authority of a jury, if they see fit, to return a general verdict, embracing the entire issue of law and fact. As it appears by the bill of exceptions, that the defendant's counsel were prohibited from addressing the jury upon questions of law embraced in the issue, the court are of opinion that the verdict ought to be set aside."

Comm. v. *Porter*, 51 Mass. 263, 287.

CONCLUSION

The decision of the Circuit Court of Appeals, here under review, was clearly right, and it should be affirmed.

Dated: New York, January, 1942.

Respectfully submitted,

LOUIS B. BOUDIN,
Attorney for respondent Cahill.

LOUIS B. BOUDIN,
of Counsel.